

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, CITY OF NEW YORK,
STATE OF CONNECTICUT, and STATE OF
VERMONT,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND
SECURITY; CHAD F. WOLF, *in his official capacity as
Acting Secretary of the United States Department of
Homeland Security*; UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES; KENNETH T.
CUCCINELLI II, *in his official capacity as Acting
Director of United States Citizenship and Immigration
Services*; and UNITED STATES OF AMERICA,
Defendants.

**CIVIL ACTION NO.
19 Civ. 07777 (GBD)
(OTW)**

MAKE THE ROAD NEW YORK, AFRICAN
SERVICES COMMITTEE, ASIAN AMERICAN
FEDERATION, CATHOLIC CHARITIES
COMMUNITY SERVICES, and CATHOLIC LEGAL
IMMIGRATION NETWORK, INC.,

Plaintiffs,

v.

KEN CUCCINELLI, *in his official capacity as Acting
Director of United States Citizenship and Immigration
Services*; UNITED STATES CITIZENSHIP &
IMMIGRATION SERVICES; CHAD F. WOLF, *in his
official capacity as Acting Secretary of Homeland
Security*; and UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

**CIVIL ACTION NO.
19 Civ. 07993 (GBD)
(OTW)**

JOINT STATUS LETTER

Pursuant to this Court's orders dated October 23, 2020, *Make the Road
New York, et al. v. Cuccinelli, et al.*, No. 19 Civ. 7993 (GBD) (OTW) ("MRNY") ECF
No. 264 & 265; *State of New York, et al. v. U.S. Dep't of Homeland Security, et al.*, 19-

cv-7777 (GBD) (OTW) (“*State of New York*”) ECF No. 236 & 237, the parties, by and through their respective counsel, hereby submit this joint status letter to identify disputed issues regarding discovery and report on defendants’ progress regarding the privilege log.

I. **Disputes Concerning Initial Disclosures**

On October 23, 2020, this Court issued a scheduling order, *MRNY* ECF No. 264; *State of New York* ECF No. 236 (the “Scheduling Order”), requiring the parties to exchange initial disclosures by November 6, 2020. The Scheduling Order directed defendants to file a brief by close of business on October 26, 2020 if they intended to oppose the production of initial disclosures. *Id.* Defendants chose not to file such a brief.

On November 6, 2020, the parties exchanged initial disclosures pursuant to the Scheduling Order. In their initial disclosures, plaintiffs collectively identified 27 persons likely to have discoverable information and provided descriptions and locations of potentially relevant documents. *See* Exs. A & B. Defendants, in their initial disclosures, stated that they “have not identified any individuals likely to have discoverable information that defendants may use to support their defenses in this action.” Ex. C at 2. Defendants further stated that “[a]t this time, Defendants expect to rely on the administrative record to support their defenses.” *Id.*

Plaintiffs have informed defendants that they do not believe defendants’ initial disclosures comply with the Scheduling Order or with Federal Rule of Civil Procedure 26(a)(1). It is unclear to defendants why plaintiffs believe defendants’ initial disclosures are deficient. In a letter to defendants’ counsel, plaintiffs’ counsel argued that defendants must “disclose relevant witnesses and categories of documents.” In a response letter, defendants explained that, in 2000, “[t]he Rule 26(a)(1) initial disclosure

provisions [were] amended” to, among other things, narrow “[t]he scope of the disclosure obligation . . . to cover only information that the disclosing party may use to support its position.” *See Advisory Committee Notes to 2000 Amendments to Fed. R. Civ. P. 26.* Since those amendments, “[a] party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.” *Id.*; *see also* 6 Moore’s Federal Practice - Civil § 26.22 (2020) (“The 2000 amendments eliminated the requirements that the parties disclose information concerning individuals or documents that might be detrimental to their cases or that might have knowledge or contain information ‘relevant to disputed facts alleged with particularity in the pleadings,’ even though the disclosing party had no intention of using the individual or document in the presentation of its case.”); *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 129 (S.D.N.Y. 2015) (“Rule 26(a)(1)(A)(i) requires identification of persons that a party ‘may use’ to support its claims or defenses, not everyone with knowledge about the subject matter.”), *objections overruled by* 325 F.R.D. 55 (S.D.N.Y. 2018); *In re Initial Pub. Offering Sec. Litig.*, 220 F.R.D. 30, 33 (S.D.N.Y. 2003).¹ Plaintiffs did not respond to defendants’ letter and have not explained why they believe defendants’ initial disclosures are non-compliant with Rule 26 or the Scheduling Order.

¹ *See also, e.g., Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 954 (10th Cir. 2004) (“[A] party is not obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.” (citation and internal quotation marks omitted)); *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 620 (C.D. Cal. 2013) (“[E]ven if a party possesses evidence relevant to its claims or defenses, the party is not required to disclose it under Rule 26 if the party does not intend to use the evidence to support its claims or defenses.”); *Gluck v. Ansett Australia Ltd.*, 204 F.R.D. 217, 221 (D.D.C. 2001) (same).

Plaintiffs reserve all rights to seek an order prohibiting defendants from calling any witnesses at trial in addition to any other appropriate relief. *See Greifman v. Grossman & Karaszewski, PLLC*, No. 19-CV-04625 (PMH), 2020 WL 1659750, at *3 (S.D.N.Y. Apr. 3, 2020) (limiting plaintiff's evidence at trial to witnesses and documents referenced in defendants' initial disclosures where plaintiff failed to serve initial disclosures and argued she "will rely only on [defendant's] initial disclosures.").

II. **Privilege Logs**

Defendants produced their most recent privilege log and an appendix containing information about the individuals listed in the log on November 27, 2020. Plaintiffs are reviewing the log and the appendix.

Defendants report that, as of December 2, 2020, 49,439 documents have been batched for review in the Department of Justice document review platform. 49,363 (i.e., 99.8%) of those documents have undergone an initial review. There are currently 4,497 documents that require final review by agency counsel and, as necessary, by counsel at the Department of Justice. In addition, defendants have identified hundreds of documents containing third party equities which require consultation with third parties, in part to obtain information about employees of other agencies as required by the Court's October 23, 2020 Order.

III. **Confidentiality Order**

The parties are conferring about the scope of a confidentiality order of which they plan to jointly seek entry.

IV. **Document Requests**

On December 2, 2020, Plaintiffs served their First Request for the Production of Documents to Defendants containing 18 document requests.

V. **Settlement Conference**

The parties do not wish to schedule a settlement conference at this time.

Dated: New York, New York
December 2, 2020

By: /s/ Jonathan H. Hurwitz

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